

Dang (Migration) [2018] AATA 107 (17 January 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Le Van Dang

CASE NUMBER: 1621945

DIBP REFERENCE(S): BCC2014/2942359

MEMBER: Moira Brophy

DATE: 17 January 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulation; and.
- r.2.03A.

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• Statement made on

17 January 2018 at 4:12pm

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CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – De facto relationship – Relationship registered with NSW Birth Deaths and Marriages – Genuine and continuing relationship – Presented themselves as a couple to family and friends – Joint assets and bank accounts – Credible witness

LEGISLATION

Migration Act 1958, ss 5F, 5CB, 65

Migration Regulations 1994 rr 1.09A(3), 2.03A Schedule 2 cls 820.211, 820.221

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STATEMENT OF DECISION AND REASONS

ISSUE

1. The issue in the present case is whether at the time of the application and for at least the period of 12 months ending immediately before the date of the application the applicant was the de facto spouse of the sponsoring partner.

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 13 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 5 November 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the parties had not been in a defacto relationship for 12 months at the time of application.
5. The applicant, Mr Le Van Dang appeared before the Tribunal on 12 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Homer Gonzales.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The applicant was born in Vietnam on 7 February 1990. He has declared no previous relationships. The applicant's parents, and six of his nine siblings are in USA. He has one brother in Vietnam and one brother and one sister in Australia.
9. The applicant's sponsor was born in the Philippines on 6 October 1981. He has declared no previous relationships. The sponsor's father is deceased, his mother and one brother live in the Philippines and he has one sister living in Australia.
10. The parties stated that they met on 10 June 2011 at Ingle Farm in Adelaide. They committed to each other to the exclusion of all others and commenced a defacto relationship on 22 November 2011. They have lived together at various addresses since that time. They registered their relationship with NSW Registry of Births Deaths and Marriages on 2 June 2017.
11. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate was satisfied the parties were in a defacto relationship at the time of decision but was not satisfied on the evidence the parties had been in a defacto relationship for twelve

months prior to the date of application. Nor had they provided any claims of a compelling and compassionate nature to waive the 12 month requirement for de facto relationships.

12. Prior to the hearing the applicant's migration agent provided:

- Submission;
- Applicant's statement;
- Sponsor's statement;
- Statement from Housing Services manager at the Sydney Adventist Hospital;
- Three statutory declarations (Form 888);
- Copies of travel tickets;
- Photographic evidence;
- Bank statements for accounts held in name of sponsor for period from October 2013 to December 2014;
- Bank statements for Goal Saver account in joint names for period from 17 April 2014 to December 2014;
- Bank statements for Smart Access account in both names for period from 16 September 2013 to December 2014;
- Bank statements for Complete Access Account held in name of sponsor for period from 21 October 2013 to December 2014.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant and her sponsor.

14. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living arrangements was consistent and coherent. They had a detailed knowledge of each other's families and daily routines. The Tribunal found them to be credible. The Tribunal accepts the parties met on 10 June 2011 when they were both studying in Adelaide. They committed to each other to the exclusion of all others and commenced a defacto relationship on 22 November 2011. The sponsor was required to only do a Bridging course to have his nursing qualifications from the Philippines recognised and so he completed his studies earlier than the visa applicant. It was a requirement of his visa he obtain employment and in November 2011 he accepted a job in Sydney. The applicant had to remain in Adelaide to complete his studies. The applicant moved to Sydney in January 2014 and the parties have resided together at various addresses since that time. During the period from November 2011 until January 2014 the parties continued their relationship although they were geographically separated. The parties acknowledge their relationship had a rapid inception but were both adamant they wanted to commit to each other to the exclusion of all others from November 2011 and they have been in a mutually exclusive relationship ever since.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

15. Clause 820.211(2)(a)] and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian permanent resident.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

16. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
17. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

18. Financial

19. The parties live in rented accommodation and both names are on the Residential Tenancy Agreement. They pay rent of \$350 per week. The rent is direct debited from their joint account. The accounts for the utilities are in the name of the applicant but payments for those accounts are deducted from their joint account. They have lived at the present address since July 2017 and were at another address prior to that.
20. The applicant is in paid employment in an aged care facility. He works variable hours from Monday to Friday at two different places. After moving to Melbourne he had a short period of unemployment and was initially employed four days per week but that has now been increased to five days a week His base salary is around \$1600 per fortnight and this is paid into an account in his name.
21. The sponsor is currently in paid employment as nurse in an oncology section of Warringul Private Hospital. He works variable hours from Monday to Friday. His base salary of around \$2400 per fortnight is paid into an account in his name.
22. The parties gave evidence they each transfer monies from their account where their pay is deposited into the joint account. The bank statements provided were corroborative of that evidence. The statements show regular household expenditure in terms of rent and utilities and other household costs were paid from that account.
23. The parties currently have one investment property in joint names and three properties in the name of the sponsor. They both gave evidence that they were unable to buy all properties in both names because of the applicants visa status. The properties are all tenanted and the rental income monies are deposited into their joint account. If there is a shortfall and they need to top up to pay the mortgages on those properties then the funds are deducted from their joint account.
24. Parties gave evidence that they currently have savings of around \$47,000 in a joint account. Both parties have access to that account.

25. Both parties gave evidence that they have superannuation and life insurance policies in their names. They each gave evidence that they have nominated each other as the beneficiary of those policies. They also have each nominated their respective sisters as beneficiaries of those accounts. Neither party has made a will.
26. The Tribunal accepts from the evidence of the parties and the bank records provided that the parties pool their financial resources and share household expenditure. The Tribunal accepts their evidence that they share the cost of most of their fixed expenses such as the rent. The parties gave evidence that the sponsor pays a larger amount into their savings each month as the applicant sends \$1000 per month to his parents who live in the USA.
27. The Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine and continuing relationship.

28. Nature of the household

29. The Tribunal accepts the parties have lived together since the applicant moved to Sydney in January 2014. The parties provided consistent and convincing evidence regarding the arrangements for their household. The applicant is responsible for the majority of the household chores, the cooking and the washing but the sponsor assists when he is able. Both parties do the grocery shopping.
30. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.

31. Social aspects of the relationship.

32. The parties provided a number of statutory declarations from family and friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.
33. As noted above the Tribunal found the oral evidence provided by the parties to be clear and persuasive evidence that the parties have been in a loving couple relationship for the past five years and that they provide one another with considerable support.
34. On the basis of the oral evidence of the parties and the evidence provided by way of photographs the Tribunal finds that the relationship between the applicant and his sponsor is recognised and supported by their family and friends. The Tribunal appreciated the candour of the parties in describing their difficulties in reconciling their relationship with their cultural and religious upbringing.
35. The Tribunal is satisfied that the parties represent themselves as being a couple in a genuine and continuing relationship to most of their family, their friends and the wider community.

36. Nature of the person's commitment to each other.

37. The Tribunal finds that the applicant and his sponsor have been in a committed relationship since June 2011. They have lived together continuously since January 2014 and they registered their relationship in June 2017.
38. The Tribunal has had the advantage of being able to observe the parties together at the hearing. Their emotional support for each other and companionship was readily apparent. They presented as a couple who loved and respected each other.

39. The parties demonstrated a detailed knowledge of each other's lives and families and daily routines. Their evidence about their future plans was consistent. The Tribunal was satisfied that the applicant and his partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.

CONCLUSION ON SPOUSE/DE FACTO CRITERIA

40. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and his partner have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds that they live together and that therefore they do not live separately and apart on a permanent basis. The parties are not related by family. The Tribunal finds that the applicant met the requirements of s.5CB(2) at the time of the application and satisfies the definition of 'spouse' in s.5F(2)(a)-(d) at the time of decision.
41. The Tribunal is satisfied on the evidence before it that the parties were in a genuine and continuing de facto relationship at the time of application and are in a genuine and continuing spousal relationship at the time of decision.
42. The applicant is not the holder of a Subclass 771 (Transit) visa. The Tribunal finds that at the time of application the applicant was the de facto partner of the sponsor who is an Australian permanent resident as evidenced by a copy of his passport, and he is not prohibited from being a sponsoring partner. Accordingly the Tribunal finds that the requirements of cl.820.211(2)(a)(i) and (ii) are satisfied.
43. The Tribunal is satisfied that at the time of application the applicant was sponsored by the sponsor, who had turned 18, in accordance with cl.820.211(2)(c)(i), and that the applicant held a substantive visa at the time of application, so cl.820.211(2)(d) is not applicable.
44. As the requirements of cl.820.211(2) are met, the Tribunal finds that cl.820.211 is satisfied.
45. The Tribunal further finds that at the time of this decision the applicant is the spouse of the sponsor, and continues to meet the requirements in cl.820.211(2), thus satisfying cl.820.221(1).
46. Therefore, the applicant meets cl.820.211 and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

47. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
48. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.

49. The applicant has provided evidence that the relationship is registered under the NSW Births Deaths and Marriages Registration Act 1995 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
50. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

52. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

53.

Moira Brophy
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).